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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/536,670

05/27/2005

Julius W. Zuehlke

1391/1650

9808

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EXAMINER

PADEN, CAROLYN A

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/536,670	<b>Applicant(s)</b> ZUEHLKE ET AL.	
	<b>Examiner</b> Carolyn A. Paden	<b>Art Unit</b> 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 16 June 2009.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-3,5-13,15-18,20-43 and 175-199 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-13,15-18,20-43 and 175-199 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

The final rejection of April 16, 2009 has been withdrawn and the request of applicant. The amendment filed June 16, 2003 has been entered. Prosecution of this application is reopened.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3, 5-13, 15-18, 20-43, 177-178, 181-191 are rejected under 35 U.S.C. 103(a) as being unpatentable over Morris (4,501,758) in view of Burke (2003/0164141) and further in view of Werner (4,663,175).

Morris discloses honey coated nuts. In example 1, peanuts are added to a revolving drum containing baffles. An aqueous mixture of lactose and maltodextrin is added to the nuts to evenly coat them. Then a mixture of sugar, starch and dried honey is added and the peanuts are tumbled to coat the nuts. The use of a second coating is contemplated at column 4, lines 12-19. The nuts are finally prepared by roasting. Claim 1 appears to differ from Morris in the length of the coating drum. It is appreciated that Morris does not mention the length of his coating drum but to use a large coating drum versus a small coating drum would have been

an obvious way to coat more peanuts. Claims 2 and, 3 appear to differ from Morris in the use of colored or speckle particulates. But to use colored sugar or starch in the dry coating of Morris would have been an obvious way to modify the nuts of Morris for holiday celebrations, such as green for St. Patrick's Day or red for Valentines Day or speckle for New Years. Claim 5 appears to differ from Morris in the in the coating time and coating weight but to change the coating time would have been an obvious way to enhance the extent of coating on the product. It is appreciated that the product weight is not mentioned but to use a large scale coating process versus a kitchen weight would have been an obvious way to produce more coating nuts. To provide particulate distribution of peanuts at specific places in the drum would have been on obvious way to assure uniform coating of the nuts. To divide the nuts into groups for supplemental treatment would have been an obvious way to provide product variety within a single batch. The use of a vibrator pan would have been an obvious way to move and distribute the particulates according to a desired size.

Applicant argues that Morris does not disclose a drum having a certain size. This has been considered but is not persuasive because it is

not seen that a drum of a specific size is required to coat the nuts of Morris.

Applicant argues that Morris does not teach any of the steps of claim 1.

This has been considered but is not persuasive. Step one of claim 1 requires placing cores into a coating drum. In example 1, of Morris, cores (peanuts) are added to a revolving drum containing baffles. In step 2 of claim 1, one or more coating syrups are added to the cores. In Morris, an aqueous mixture of lactose and maltodextrin is added to the nuts to evenly coat them. In step 3 of claim 1 a quantity of particulate is added to the cores. In Morris, a mixture of sugar, starch and dried honey is added and the peanuts are tumbled to coat the nuts. Applicant argues that he uses more than one aliquot in claims 1 and 15, but one of ordinary skill in the art would be expected to use more than one aliquot to fully provide a uniform coating to the peanuts. If further evidence were needed to demonstrate the use of multiple aliquots for coating foods, one would only need to look to Burke (2003/0164141) at feature 10. Burke shows the use of three sprays for even coating of a seasoning liquid onto food. Applicant argues that step 3 is unobvious over Morris because Morris does not perform Step 2. Applicants' argument relating to multiple aliquots is not seen to overcome the rejection of the claims over Morris.

Applicant argues that Morris does not apply more than one coating syrups. This has been considered but is not persuasive because the claims do not require more than one coating step, as discussed above. One of ordinary skill in the art would be expected to apply the particulate coating to a wet coating in order to provide a coating that sticks to the peanut. Assuming *arguendo* the claims were amended to recite more than one layer of coating, it is not seen that this amendment would constitute unobviousness. The water in the coating of Morris provides the adhesive quality to the coating (column 2, lines 21-22) If one of ordinary skill in the art wanted to seal the nuts of Morris with a coating, it would have obvious to dry the nuts to adhere the first coating to the nuts before applying a second coating layer. Further two coatings would be expected to provide a sweeter nut than a single coated nut. If further evidence for the use of drying between multiple layers of coatings were needed, one would only need to look to Werner (4,663,175 and see abstract and claim 1), who teaches multiple layers of coating on nut products with drying before the next added liquid layer.

Applicant argues that there is no suggestion in Morris to provide the components of claims 2 and 3 to Morris. This has been considered but is

not persuasive. With regard to claim 2, sugar and honey (column 4, lines 1-4) are regarded as solid flavors. It is appreciated that colored particulates or powders are not mentioned but honey coated nuts are snack foods for consumption at any time, but are particularly good during holiday celebrations. It would have been obvious to one of ordinary skill in the art to use colored particulates on the nuts of Morris to provide a holiday appearance to the nuts. Applicant argues that there is no suggestion to add particulates for the time set forth in claim 5. Claim 5 appears to differ from Morris in the in the coating time and coating weight but to change the coating time would have been an obvious way to enhance the extent of coating on the product. Applicants' arguments relating to claims 8-12 are discussed above. There is not reason why peanuts would not be considered a confectionery core, particularly when the final product is a sweetened food.

Applicants' argument relating claims 15-18 to the use of speckled particulate has been considered but is not persuasive. To prepare a honey coated nut with speckled particulate for decorative appeal would have been an obvious modification to the basic honey coated nut of Morris. No

unobvious or unexpected result is seen from the inclusion of a coating with an alternative texture, as required in claims 20 and 21.

With regard to claim 22-26, the design of the particulates on the nuts would have been within the determination of one of ordinary skill in the art.

With regard to claims 27-33, it would have been obvious to divide the particulates up into three portions in order to provide a separate application of each dried particulate. It would also have been obvious to divide the particulates up into three portions in order to be able to coat front, middle and back of the tumbler separately and in different sections. It is appreciated that the apparatus features in claims 28-29, 184-199 used to provide the particulates are not mentioned but the claims are directed to a process and not to an apparatus. The apparatus limitations are not seen to substantially alter the coating process of Morris in view of Werner and Burke.

It is appreciated that the size, shape, flavor and color of the particulates is not mentioned but to optimize the appearance of the peanuts of Morris would have been within the determination of one of ordinary skill in the art who desires to provide an attractive, colored peanut.



Claims 179-180 are rejected under 35 U.S.C. 103(a) as being unpatentable over Morris in view of Werner and Burke as applied to claims 1-3, 5-13, 15-18, 20-43, 177-178 and, 181-191 above, and further in view of Nurmi (6,821,636).

The claims appear to differ from Morris in view of Werner and Burke in the recitation of the use of xylitol and maltitol in the coating. Nurmi teaches that it is known in the art to use polyols, such as xylitol and maltitol as coatings on edible cores (see abstract and column 3, lines 49-52). It would have been obvious to utilize xylitol and maltitol as a coating in Morris as a non-cariogenic and low calorie substitute for sucrose in the nut of Morris.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 13, 175 and 177-180 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nickerk ( 7,547,792)

Nickerk discloses that it is known in the art to coat chewing gum with a liquid syrup, tumble and rotate the coated cores, drying each successive

coating and using powdered coating to build up the initial liquid coating (column 1, lines 51-62). The use of multiple nozzles or aliquots to spray the liquid coating on the gum is shown in figure 1 at feature 130. The use of a drum in the coating process is shown in figure 2. Xylitol and maltitol are disclosed in the coating at column 9, line 25 and column 7, lines 1-2. Crunchy coating is contemplated at column 7, line 6. The claims appear to differ from Nickerk in the recitation of the size of the coating drum but one of ordinary skill in the art would be expected to scale up or scale down the process of Nickerk according to the demand for the final chewing gum product. Apparatus limitations do not carry any weight in process claims. Further the change in the size and shape of the coating drum of Nickerk would not be expected to provide an unobvious process or product. It is appreciated that the size of the chewing gum batch is not mentioned but to change the batch size would have been an obvious way to adjust the scale of the production process.

Claims 2, 3, 15-18, 20, 21, 26, 34-43, 176-179 and 181 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nickerk as applied to claims 1, 13, 175 and 177-180 above, and further in view of Day (WO 02/19834).

The claims appear to differ from Nickerk in the recitation of the types of particulates used in the product and in the recitation of the inclusion of xylitol and wax. Day teaches that chewing gum is known in the art to be manufactured with colored particles and speckles (see abstract and page 1, lines 12-13). The formulations in example 1 further show the use of xylitol and wax in the coating. It would have been obvious to one of ordinary skill in the art to use the coating formulations of Day in the chewing gum of Nickerk to provide a chewing gum with a supplemental or therapeutic use.

No claim is allowed.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794